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ALEXANDER L. STEVAS

85-147

No. _____

# IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

Southwest Chemical Services, Inc.

*Petitioner,*

v.

The Superior Court of Maricopa County and the Hon. Howard V. Peterson, a judge thereof; Arizona Public Service Company; Mid-Mountain Contractors, Inc.; and Susan J. Smith,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

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July 24, 1985

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## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

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Petitioner Southwest Chemical Services, Inc.[1] respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Arizona entered on May 1, 1985.

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[1]The parent company of Petitioner is Aquatique, Inc., which acquired the Petitioner corporation from Morton Thiokol, Inc.

## QUESTIONS PRESENTED

1 Does it violate due process to assert personal jurisdiction over a nonresident defendant which provided services to the nonresident manufacturer but did not participate in or influence the marketing and distribution of the manufacturer's product in the forum state?

2. Does due process require that the plaintiff prove the requisite jurisdictional facts when a defendant challenges personal jurisdiction by moving to dismiss, or may a plaintiff establish jurisdiction merely by the allegations of the complaint?

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## JURISDICTIONAL STATEMENT

### Opinions Below

Neither of the courts below, the Supreme Court of Arizona and the Superior Court of Maricopa County, Arizona, issued any opinions.

### Judgment

The judgment which is the subject of this petition is the order of the Arizona Supreme Court entered May 1, 1985. (Appendix p. 3).

### Jurisdictional Statute

This Court's jurisdiction rests on 28 U.S.C. § 1257(3).

### Finality of the Judgment

The Arizona Supreme Court declined to accept jurisdiction of two petitions for "special action" filed by Petitioner Southwest Chemical Services, Inc. (hereafter "Southwest").[2] Southwest's petitions challenged the trial court's denial of Southwest's motions to dismiss for lack of personal jurisdiction in two separate but related cases.

The Arizona Supreme Court's order is a final judgment within the meaning of 28 U.S.C. § 1257. Although the order did not dispose of the entire case, it finally decided a federal issue which would be dispositive if decided in favor of Petitioner Southwest.

This Court has previously held that a state court denial of a due process challenge to personal jurisdiction is a reviewable final judgment. *Calder v. Jones*, _____ U.S. _____, 104 S. Ct. 1482, 1486 n.8 (1984); *Rosenblatt v. American Cyanamid Co.*, 86 S. Ct. 1 (Goldberg, Circuit Jus-

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[2]Arizona's special action procedure is equivalent to extraordinary writ proceedings. 17A *Ariz. Rev. Stat. Ann.*, Rules of Procedures for Special Actions, Rule 1.

ice), *appeal dismissed*, 382 U.S. 110 (1965).[3] This Court long ago recognized its power to review a state's denial of an extraordinary writ application. *Weston v. City Counsel of Charleston*, 2 Pet. 449 (1829).

Review of the Arizona Supreme Court's order as a final one is required by practicality and the purpose of the jurisdictional statute, as this Court explained in reviewing a state court decision on a venue question involving a federal statute:

> [W]e believe that it serves the policy underlying the requirement of finality in 28 U.S.C. § 1257 to determine now in which state court appellants may be tried rather than to subject them, and appellee, to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings.

*Mercantile National Bank v. Langdeau*, 371 U.S. 555, 558 (1963). *See also Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-83 (1975).

Similarly, Petitioner will be subjected to massive and potentially needless litigation if its federal due process rights are violated by requiring it to litigate in Arizona. Thus, review by this Court is not only authorized but is critically needed to prevent a constitutional violation and a shocking waste of legal and financial resources.

## CONSTITUTIONAL PROVISION INVOLVED

*U.S. Const.* amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside. No state shall make

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[3]This Court also has assumed jurisdiction in analogous circumstances without discussing finality. *E.g., World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Shaffer v. Heitner*, 433 U.S. 186 (1977). Indeed, *World-Wide* is procedurally identical to this case: the Oklahoma Supreme Court denied an application for a writ of prohibition to correct the trial court's denial of a motion to dismiss.

or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

Southwest's petition for certiorari involves two related cases posing identical questions. *See* Supreme Court Rule 19.4.

The first case is perhaps one of the most massive lawsuits in Arizona. Arizona Public Service Company (APS), a public utility, filed a complaint in 1982 seeking $50 million in damages. APS claims that its polyethylene natural gas pipeline failed, and it blames the failure on several parties: The Swanson Company, manufacturer and seller of the pipe; Sinclair-Koppers Company (Sinclair) and related corporate entities, the manufacturer and seller of the resin used by Swanson to produce the pipe; and Petitioner Southwest, which "compounded" Sinclair's resin base by mixing it with other chemicals.

The trial court denied Southwest's motion to dismiss for lack of *in personam* jurisdiction. Southwest contended that both federal due process and Arizona's long-arm rule, Rule 4, Ariz. R. Civ. P., precluded jurisdiction.

The second case is an action filed by Susan Smith in 1981 for severe personal injuries caused by an explosion of gas in the polyethylene pipeline. She seeks $50 million in actual damages and $50 million in punitive damages. Petitioner Southwest's motion to dismiss was based on the same grounds as in the first case, and it too was denied.

Southwest contended both that plaintiffs lacked evidence of minimum contacts and that the evidence affirmatively demonstrated the absence of minimum contacts with Arizona. Southwest neither conducts business nor owns property in Arizona. It had no contact with any of the Arizona residents — APS, Swanson and Smith.

Petitioner Southwest performed its compounding services in Texas under contract with the resin manufacturer's Texas plant. The manufacturer, Sinclair, sold the compounded resin product to an Arizona buyer, Swanson. The product was Sinclair's and was labelled as such. Sinclair alone controlled its marketing and distribution. Although the resin was located at Southwest's Texas plant before it was shipped, Petitioner had no role in its transport: Sinclair made the arrangements for most shipments with a common carrier; on a few occasions, the Arizona customer (Swanson) came to Texas to get the product. Some of Sinclair's documents indicate that Swanson was its customer, but none show that Swanson is an Arizona company. There is no evidence that Petitioner Southwest was aware that Arizona was the ultimate destination of the resin.

There also is no evidence that the failure of the pipe was due to defects in the manufacture of the resin. On the contrary, two investigative reports — one by APS and the other by the Arizona Corporation Commission, a state governmental body — point to improper installation of the pipe by Mid-Mountain Contractors, Inc. In the Smith case, APS and Mid-Mountain entered into agreements with Smith under which she has received $4.5 million and has been guaranteed a total minimum recovery of $7.5 million.

## REASONS FOR GRANTING THE PETITION

### I. THE DISAGREEMENT ON THE LIMITS OF PERSONAL JURISDICTION OVER "UPSTREAM" DEFENDANTS IN PRODUCTS CASES SHOULD BE RESOLVED BY THIS COURT.

This Court has addressed the due process limits on personal jurisdiction in a products case. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). The facts of that case, however, were limited to an automobile retailer and a wholesale distributor — entities which are "down-

stream" from the manufacturer in the flow of products to the consumer.

This petition presents a different situation. Petitioner Southwest is "upstream" from the manufacturer in the chain of commerce. Southwest performed a service on Sinclair's resin product. Sinclair in turn supplied the resin as raw material for the manfacture of the pipe by Swanson. Swanson then sold the pipe to APS. Southwest did not participate in the sale or distribution of either the resin or the pipe.

Southwest's position in the stream of commerce is shared by many other commercial entities such as suppliers of raw materials and component manufacturers. They are upstream from the product manufacturer and thus are more remote from the plaintiff than any other party in the commercial chain.

The important role of upstream businesses in the nation's commerce in manufactured goods is undeniable. Their business requires certainty regarding their susceptibility to suit in a foreign forum. *See Lakeside Bridge & Steel Co. v. Mountain State Construction Co., Inc.*, 445 U.S. 907 (1980) (White, J., joined by Powell, J., dissenting from denial of petition for certiorari); Comment, *Constitutional Limitations on State Long Arm Jurisdiction*, 49 *U. Chi. L. Rev.* 156 (1982). Justice White's observations in *Lakeside Bridge*, 445 U.S. at 910-11, are perhaps even more applicable to the instant case:

> The question at issue is one of considerable importance to contractual dealings. . . . The disarray among federal and state courts noted above may well have a disruptive effect on commercial relations in which certainty of result is a prime objective. That disarray also strongly suggests that prior decisions of this court offer no clear guidance on the question.

Yet deep division among the lower courts makes the rules quite uncertain. State and federal courts do not agree on whether jurisdiction can be asserted over upstream defendants or even on the criteria for deciding that question.

Although Petitioner contends that the rules set forth in *World-Wide* apply with at least equal force to upstream as well as downstream defendants, many courts view that opinion as confined to the downstream defendants involved in that case. They refuse to apply *World-Wide*'s limitations to upstream defendants, leading them to extend jurisdiction even more freely than is possible with the manufacturers, distributors and retailers which have more direct contacts with the plaintiff and the forum. *See, e.g., Rockwell International Corp. v. Costruzioni Aeronautiche,* 553 F. Supp. 328 (E.D. Pa. 1982) (distinguishing *World-Wide* as a retailer case and asserting jurisdiction over a foreign manufacturer of helicopter parts).

Another case relying upon this "distinction" to extend jurisdiction over a non-resident component manufacturer is *Bean Dredging Corp. v. Dredge Technology Corp.,* 744 F.2d 1081 (5th Cir. 1984). That court decided that "the mere fact of being a component-part manufacturer affords [defendant] no solace." 744 F.2d at 1085. Despite the lack of any direct contacts with the forum state and the lack of defendant's control or participation in the distribution of the product, the court upheld jurisdiction. In short, *Bean Dredging* proposes that an upstream defendant is subject to jurisdiction anywhere the primary manufacturer's product is sold, regardless of the limited and indirect nature of the defendant's involvement with the forum.

State courts are also reading *World-Wide* narrowly. For example, *Ford Motor Co. v. Atwood Vacuum Machine Co.,* 392 So. 2d 1305 (Fla. 1981), upheld jurisdiction over a non-resident component manufacturer. After boldly holding that *World-Wide* was inapplicable, 392 So.2d at 1311, the court directly contradicted the general principles stated in *World-Wide:*

> [T]he fact that a nonresident manufactures a component part outside the state and takes no part in the sale, distribution, or marketing of the finished product

in the state is no basis for a limitation on jurisdiction. 392 So. 2d at 1313.

Like the dissenters in that case, *see* 392 So. 2d at 1313 (Sundberg, C.J., dissenting), Petitioner believes that *World-Wide* sets forth principles of more general application. Decisions such as *Ford Motor* mean that upstream defendants are "subject to litigation anywhere in the states" regardless of their remoteness from the forum. 392 So. 2d at 1314. Such unlimited vulnerability to suits in distant forums contradicts the basic due process notion that jurisdiction is limited and clearly conflicts with *World-Wide's* explication of those limits. If anything, jurisdiction should be more limited over upstream defendants, whose contacts with the forum and the plaintiff are more remote than those downstream in the flow of commerce.

Most courts find *World-Wide* applicable to all defendants in products cases. However, even these courts disagree regarding its jurisdictional requirements. Roughly half of the cases correctly conclude that due process, as explained in *World-Wide,* creates significant limits on jurisdiction which require:

— more than the "foreseeability . . . that a product will find its way into the forum State," 444 U.S. at 297;

— that "potential defendants [must have the ability] to structure their primary conduct" to avoid suits in a foreign forum, *id.;*

— that defendant must have "purposefully avail[ed] itself of the privilege of conducting activities within the forum State," *id.;*

— that such purposeful activity is "not simply an isolated occurrence," but constitutes intentional "efforts . . . to serve, directly or indirectly, the market for [defendant's] product in other States," *id.;*

— that the conduct of another party, such as the primary manufacturer, "cannot satisfy the requirement of con-

> tact [by the defendant] with the forum States." 444 U.S. at 298.

*E.g., Talbot Tractor Co., Inc. v. Hinomoto Tractor Sales, USA,* 703 F.2d 143 (5th Cir. 1983); *Insurance Co. of North America v. Marina Salina Cruz,* 649 F.2d 1266 (9th Cir. 1981); *DeJames v. Magnificence Carriers, Inc.,* 654 F.2d 280 (3d Cir.) *cert. denied,* 454 U.S. 1085 (1981); *Midwest Elevator Systems, Inc. v. St. Paul Fire & Marine Ins. Co.,* 508 F. Supp. 578 (D. Kan. 1981); *Shaw v. American Cyanamid Co.,* 534 F. Supp. 527 (D. Conn. 1982). *See also* S. Jay, *"Minimum Contacts" As a Unified Theory of Jurisdiction: A Reappraisal,* 59 *N.C. L. Rev.* 429, 444 (1981); K. Ripple and M. Murphy, *World-Wide Volkswagen Corp. v. Woodson: Reflections on the Road Ahead,* 56 *Notre Dame Law.* 65, 80 (1980).

Many courts, however, have ignored or misinterpreted the fact that *World-Wide* "repeatedly emphasizes," 56 *Notre Dame Law.* at 80, the purposefulness of the defendant's conduct. These cases adopt a foreseeability or knowledge test even though that standard was emphatically rejected in *World-Wide.* 444 U.S. at 296-97. *E.g., Hedrick v. Daiko Shoji Co., Ltd.,* 715 F.2d 1355, 1358 (9th Cir. 1983) (defendant is subject to jurisdiction if it "knew or should have known that a product would enter the stream of commerce"); *Clay v. Hopperton Nursery, Inc.,* 533 F. Supp. 476, 481 (E.D. Ky. 1982) (even though buyer solicited seller, seller was subject to jurisdiction either because it sold the product to buyer residing in forum state or because its product caused an effect in forum; complaining that Supreme Court has 'oscillated between the conflicting goals of protecting the interests of the plaintiff and the forum state, and insuring fairness to the nonresident defendant"); *Copiers Typewriters Calculators, Inc. v. Toshiba Corp.,* 576 F. Supp. 312, 317-18 (D. Md. 1983) (sales to U.S. distributor-subsidiary by alien manufacturer; noting that courts are divided on whether due process permits jurisdiction over alien manufacturer); *Tedford v. Grumman American Aviation*

*Corp.*, 488 F. Supp. 144, 146 (N.D. Miss. 1980) (airplane engine remanufacturer was subject to jurisdiction because it knew that airplane with engine as component "would be purchased and used by someone engaged in agricultural pursuits").

The uncertainty concerning *World-Wide* thus has led to conflict among the lower federal courts and even to apparent intracircuit conflict. *Compare INA v. Marina Salina Cruz, supra, with Hedrick v. Daiko Shoji, supra.*

Without this Court's guidance, the problem will worsen. The States have a natural inclination to read *World-Wide* narrowly, for "The State's incentive is always to expand jurisdiction to the detriment of out-of-state enterprises and the out-of-state consumers to whom the costs [of litigation and liability] are passed." L. Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction,* 1980 *Sup. Ct. Rev.* 77, 95 (1981).

*World-Wide* has not resolved the issue of jurisdiction over nonresident defendants who, though in the chain of commerce in a product which comes to rest in the forum, lack direct contacts with the forum. The courts are divided on whether *World-Wide's* limitations apply to "upstream" defendants such as petitioner Southwest. Even those which agree that *World-Wide* applies cannot agree on what it requires. Yet the issue frequently recurs, for jurisdictional questions in products cases have multiplied in proportion to the growth in interstate commerce in manufactured products.

The instant case is an excellent vehicle for resolving the uncertainty on this important constitutional issue. Like *World-Wide,* this is a case of clear and well-developed facts. As in *World-Wide,* the Petitioner's relationship with the forum is fortuitous rather than deliberate and arises indirectly from the unilateral conduct of another party — here, the manufacturer of the raw materials, Sinclair. The respondents' argument below rested on three clearly inadequate theories: first, the factually unsupported assertion that

Petitioner shipped the product to Arizona; second, the theory (rejected in *World-Wide*) that Petitioner could have foreseen that Arizona was the product's ultimate destination; third, the claim (also rejected in *World-Wide*) that Petitioner's "contact" with Arizona was that the product ultimately came to rest and caused harm in Arizona.

Because all of the essential principles of *World-Wide* are involved in this case, granting the Petition will allow the Court to reiterate and extend them to upstream defendants:

— Petitioner's alleged awareness that the resin product would be sold by the resin manufacturer in interstate commerce, even if true, is mere "foreseeability" and relies on the "unilateral activity" of another party to confer jurisdiction;

— Because another entity (Sinclair) exclusively controlled and participated in the marketing and distribution of the product, Petitioner lacks "purposeful" conduct and the ability to "structure [its] primary conduct" needed to assert jurisdiction over it;

— Petitioner's contract, entered into and performed exclusively in Texas, was "far too attenuated a contact" with Arizona to constitute purposeful availment of the benefits of the forum State's laws;

— The interest of the State of Texas, where Petitioner and the resin manufacturer do business and where all of Petitioner's work was performed, cannot be subjugated by Arizona's assertion of jurisdiction over a party which does no business in Arizona.

A decision on the merits in favor of Petitioner would by no means forbid jurisdiction over all upstream defendants. Rather, it would simply dispose of the notion that there are no constitutional limits on jurisdiction and redefine those limits.

## II. THE COURTS NEED A DEFINITE STATEMENT THAT DUE PROCESS REQUIRES THE PARTY ASSERTING JURISDICTION TO PROVE THE REQUISITE JURISDICTIONAL FACTS.

The burden of proof issue was crucial in both the Smith and APS cases, but it was particularly highlighted in the Smith case. The parties opposing Southwest's dismissal from the Smith case generally relied upon the allegations of the complaint as "establishing" jurisdiction. The only evidence presented to support jurisdiction was two Sinclair documents reflecting that its finished resin product would be sold to the Swanson Company. Although Swanson is an Arizona corporation, Sinclair's documents do not reflect that fact.

Southwest's argument that plaintiffs had the burden of proving the requisite jurisdictional facts, and yet had failed to discharge that burden, went unheeded by the Arizona courts. Neither the trial nor appellate courts provided any explanation for denying relief to Southwest.

The state and lower federal courts diverge on the burden of proof issue. This split is attributable to the lack of a definitive statement by this Court that jurisdiction depends on the facts and not mere allegations, and that the burden of proving those facts is the plaintiff's when jurisdiction is challenged by a motion to dismiss.

Although this Court has not decided the question, most courts concur with Petitioner's view. *E.g., Compagnie des Bauxites de Guinee v. Insurance Co. of North America,* 651 F.2d 877 (3d Cir. 1981), *aff'd sub nom. Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee,* 456 U.S. 694 (1982). There is also a developing consensus that to survive dismissal, the plaintiff must prove jurisdictional facts only by "prima facie" evidence; plaintiff confronts the "preponderance of evidence" standard only at trial or in a preliminary hearing. *E.g., Data Disc, Inc. v. Systems Technology Associates, Inc.,* 557 F.2d 1280 (9th Cir. 1977);

*Marine Midland Bank, NA v. Miller,* 664 F.2d 899 (2d Cir. 1981). *See* Rule 12(d), Fed. R. Civ. P. (preliminary hearing).

Some courts place the burden of proof on the moving defendant, however. They hold that the allegations of plaintiff's complaint must be taken as true unless rebutted by the movant's evidence. *E.g., Murphy v. Erwin-Wasey, Inc.,* 460 F.2d 661 (1st Cir. 1972); *American Land Program, Inc. v. Bonaventura Uitgevers Maatschappij,* 710 F.2d 1449 (10th Cir. 1983). These courts are clearly wrong. "It is clear that the party seeking to invoke the jurisdiction of the federal court has the burden of establishing that jurisdiction exists." *Data Disc,* 557 F.2d at 1285.

Moreover, this Court has held that a plaintiff bears the burden of proving jurisdictional facts when a defendant challenges subject matter jurisdiction. A motion to dismiss based on the lack of a minimum amount in controversy requires the plaintiff to present facts supporting jurisidiction. *KVOS, Inc. v. Associated Press,* 299 U.S. 269 (1936); *McNutt v. General Motors Acceptance Corp.,* 298 U.S. 178 (1936).

Requiring a defendant to litigate on no more than unsupported allegations of jurisdiction is patently unfair. Moreover, the specific due process limits on jurisdiction, such as the "minimum contacts" test, presume a factual showing by plaintiff. This Court has already intimated that facts sufficient for personal jurisdiction must be demonstrated by the plaintiff. *See Insurance Corp. of Ireland, Ltd. v. Compagnie Des Bauxites de Guinee,* 102 S. Ct. at 2105 and n.10.

The need for a definitive ruling is pressing because the burden of proof is a threshold issue in every motion to dismiss for lack of jurisdiction. In this case, Petitioner Southwest has been forced to participate in two enormously costly and complex lawsuits on little more than bare assertions that it is subject to Arizona jurisdiction.

This Court's review is needed to resolve both of the issues presented by this petition. First, the constitutional limits on jurisdiction over upstream defendants should be defined.

Second, the plaintiff's burden of proving the requisite jurisdictional facts should be stated definitively.

Petitioner Southwest Chemical Services, Inc., therefore respectfully requests that this Court grant the petition and issue a writ of certiorari to the Supreme Court of Arizona.

JENNINGS, STROUSS &
SALMON

By _____

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SUPERIOR COURT OF ARIZONA

MARICOPA COUNTY

Vivian Kringle, Clerk

| 2-7-85 | Hon. Howard V. Peterson | R. Coffman |
|---|---|---|
| Date | Judge or Commissioner | Deputy |

NO. C 445685

Susan J. Smith

vs.

Arizona Public Service

Company

This matter having been under advisement,

IT IS ORDERED denying the Motion to Dismiss For Lack of Jurisdiction Over The Party of Southwest Chemical Services.

SUPERIOR COURT OF ARIZONA

MARICOPA COUNTY

Vivian Kringle, Clerk

| 1/7/85 | Hon. Howard V. Peterson | R. Coffman |
|---|---|---|
| Date | Judge or Commissioner | Deputy |

NO. C 463933
C 479446 Consolidated

ARIZONA PUBLIC SERVICE COMPANY

vs

ATLANTIC RICHFIELD COMPANY,

et al

This matter having been under advisement,

IT IS ORDERED denying the Motion to Dismiss For Lack of Jurisdiction Over The Person of Defendant Southwest Chemical Services, Inc.

# Supreme Court
STATE OF ARIZONA

May 1, 1985

RE: SOUTHWEST CHEMICAL SERVICES, INC. vs.
MARICOPA COUNTY SUPERIOR COURT et al
Supreme Court No. 17966-SA
Maricopa County No. C-463933

and

SOUTHWEST CHEMICAL SERVICES, INC. vs.
MARICOPA COUNTY SUPERIOR COURT et al
Supreme Court No. 18030-SA
Maricopa County No. C-445685

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on April 30, 1985, in regard to the above-referenced cause:

"ORDERED: The Court declines to accept jurisdiction of the Petitions for Special Action."

S. Alan Cook, Clerk

**IN THE SUPERIOR COURT OF
THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA**

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| ARIZONA PUBLIC SERVICE COMPANY, an Arizona corporation,<br>Plaintiff,<br>vs.<br>ATLANTIC RICHFIELD COMPANY, a Pennsylvania corporation; SINCLAIR-KOPPERS COMPANY, a partnership; ARCO POLYMERS, INC., a Pennsylvania corporation; THE SWANSON COMPANY, MANUFACTURERS, an Arizona corporation, also known as THE SWANSON COMPANY; SOUTHWEST CHEMICAL SERVICES, INC., a foreign corporation formerly known as SOUTHWEST CHEMICAL & PLASTICS COMPANY; XYZ CORPORATIONS I-X; BLACK AND WHITE PARTNERSHIPS I-X; and DOES I-X, inclusive,<br>Defendants. | NO. C-463933<br>AFFIDAVIT OF CHARLES P. LEWIS<br>COUNTY OF HARRIS, State of Texas } ss. |

CHARLES P. LEWIS, being first duly sworn, upon his oath, deposes and says:

1. That he is the Vice-President of Finance for the defendant, Southwest Chemical Services, Incorporated.

2. That this Affidavit is based upon his personal knowledge of the events set forth in the Second Amended

Complaint, as well as his review of certain business records maintained by Southwest Chemcial Services, Incorporated.

3. That on June 28, 1956, United States Automation, a Delaware Corporation, was formed. Subsequently, on May 19, 1960, the corporate name was changed to Southwest Chemical & Plastics Company, and on June 25, 1973, the corporate charter was amended to reflect the present corporate name of Southwest Chemical Services Incorporated.

4. That since its incorporation on June 28, 1956, Southwest Chemical Services Incorporated has remained a Delaware Corporation with its principal place of business in Houston, Texas.

5. That since May 19, 1960, Southwest Chemical Services, Incorporated has served as a compounder for the domestic olefin market, and from May 19, 1960 through the present date its principal business has consisted of custom compounding for major chemical and petroleum companies.

6. That Southwest Chemical Services, Incorporated custom compounding business is or has been carried on at its Deer Park, Seabrook and Crockett, Texas plants. In addition, the corporate headquarters is located in Houston, Texas.

7. That initially, Southwest Chemical Services Incorporated remained a small operation employing approximately 13 individuals. During the 1970's, approximately 60 to 70 people were employed by Southwest Chemical Services Incorporated in its custom compounding business, and today Southwest Chemical Services Incorporated employs 244 people.

8. That since June 28, 1956, Southwest Chemical Services, Incorporated has never been licensed or qualified to do business in the State of Arizona.

That since June 28, 1956, Southwest Chemical Services, Incorporated has had no subsidiary corporation or divisions either located or licensed to do business in Arizona. In addition, since June 28, 1956, Southwest Chemical Services In-

corporated has never had any bank accounts, records, or property located in the State of Arizona, and, until the present cause of action, has never been a party in any suit filed in and litigated in Arizona.

10. That since June 28, 1956, Southwest Chemical Services Incorporated has never had any officers, employees, distributors or agents that have either resided or been stationed in the State of Arizona while employed by Southwest Chemical Service Incorporated.

That since June 28, 1956, Southwest Chemical Services, Incorporated, to the best of my knowledge, has never received orders for or performed any custom compounding for customers having their principal place of business in the State of Arizona.

Further your affiant sayeth naught.

CHARLES P. LEWIS

Charles P. Lewis

SUBSCRIBED AND SWORN to before me this 18th day of October, 1984.

BEVERLY J. MERIN

NOTARY PUBLIC

My Commission Expires:

April 1, 1985